# Reviews

## Australian Journal of Human Rights

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In recent years human rights standards have increasingly been used as touchstones in judicial decision making. This trend has signalled a shift in the way Australia's international obligations are recognised and protected by our legal system. It has also 'contributed to an increased interest by politicians, judges, academics, bureaucrats and members of the public, in human rights and their application on local, national and international levels'.[1]

In the *Mabo* decision Justice Brennan noted 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[2] The recent High Court decision of *Minister for Immigration & Ethnic Affairs v Teoh* held that domestic decision makers should have regard to the provisions of international conventions if they are relevant and a legitimate subject matter for consideration. If a decision maker will not consider the relevant international instrument, the affected person must have an opportunity to submit a case as to why the decision maker should take the convention into account. The Court further found that even if a convention, in this case the *Convention on the Rights of the Child*, has not been incorporated into domestic law this does not mean the international instrument is without significance within Australia. It went on to say that a legitimate expectation exists that the provisions of international instruments will be applied by administrative decision makers in the absence of statutory or executive indications to the contrary.

The Commonwealth's legislative response to the Human Rights Committee's decision in the *Toonen* case[3] signalled its apparent willingness to take its international obligations seriously. The Commonwealth Government has decided, however, to legislate to short circuit the *Teoh* decision. This proposed legislation is now before Parliament. Such a move flies in the face of Australia's international reputation as a leader in human rights promotion and protection. It is inconsistent with Government claims, which have been made both domestically and internationally, that it is committed to the promotion of human rights. Senator Gareth Evans espoused this commitment in late 1994 when he stated that the Commonwealth Government 'will continue to work in ways which put effectiveness above rhetoric ... we will maintain our resolve to promote human rights with absolute consistency in all available forums, without double-standards'.[4] It is deeply regrettable that the *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth) can be expected to find its way onto the Australian statute books.

The first publication of the *Australian Journal of Human Rights* is timely. The journal comprises articles, commentary and book reviews on human rights developments in Australia and the Asia-Pacific region. The journal takes a multi-disciplinary approach to human rights and is devoted to the exclusive discussion of current human rights scholarship.

Much of the December 1994 edition is concerned with the on-going debate on the attempt to legislate against racial vilification in Australia. At the time of writing this is a live and contentious issue. The *Racial Hatred Bill 1994* (Cth) still awaits debate in the Senate. Many predict its passage through the Commonwealth Parliament will be very rocky indeed and that the Bill will not pass without significant amendment.

The content of the journal's symposium entitled *Striking it Right: Racial Vilification in Australia* is balanced and well reasoned. The articles collected in this section provide the reader with practical information as well as theoretical and jurisprudential perspectives on racial vilification in the Australian context. Several very useful articles on current approaches to racial vilification in other common law jurisdictions and the United States, as well as an analysis of the experience of the NSW racial vilification legislation five years after its enactment, are also provided.

The jurisprudence of international law has become increasingly important for Aboriginal and Torres Strait Islander peoples as they watch the development and passage of the *Draft Declaration on the Rights of Indigenous Peoples* through the United Nations. International law is increasingly seen by indigenous peoples as a possible means for compelling action and change. As Australian governments continue to deny both the citizenship rights and collective rights of Australia's first peoples, Aboriginal and Torres Strait Islander individuals are beginning to explore the potential of international complaint mechanisms.

In this context the *Australian Journal of Human Rights* includes several articles of particular interest and relevance. Larissa Behrendt's compelling critique of the Australian legal system and its impact on the human rights of Aboriginal and Torres Strait Islander peoples provides a perspective on law rarely heard in this jurisdiction. Behrendt discusses the right to self-determination and the enormous gap which exists between non-indigenous interpretations of that right and indigenous notions of its content. Her anlaysis is a succinct and troubling summary of the problem which lies at the heart of much policy development and program provision in the area of indigenous affairs in Australia.

Behrendt points out 'the Government definition [of self-determination] is not without extreme bias. It is designed to ensure that Aboriginal people are not empowered within the system but the system is still able to say that the right to 'self-determination' is being protected.'[5] In the light of the *Mabo* decision and increasing calls from Aboriginal and Torres Strait Islander communities to be given the right to determine their own futures, it is imperative that indigenous perspectives on human rights continue to be included in journals such as this one.

Neil Lofgren's article on complaint procedures under Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* outlines the strategy required to lodge a complaint under this international instrument. Australia's acceptance of the competence of the Committee Against Torture to receive and consider a complaint from, or on behalf of, an individual under this Convention directly implements a recommendation of the Royal Commission into Aboriginal Deaths in Custody.[6] Practically, this means that

prisoners may now be able to complain to the Committee.

This article provides welcome information about an international complaint mechanism with which many are, as yet, unfamiliar. In the light of the continued disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, as well as the prevalence of indigenous deaths in custody, this article is particularly relevant to indigenous people considering both their complaint options and the political tools at their disposal.

The *Australian Journal of Human Rights* is a welcome addition to the library of anyone working or interested in the area of human rights. It can be obtained annually from the University of New South Wales for $40 within Australia ($30 concession) and $50 for overseas subscribers.

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### References


1. Evatt, E., 'Foreword' (1994) 1 *Australian Journal of Human Rights* 1.
2. *Mabo and Others v The State of Queensland [No.2] (1992)* 175 CLR 1 at 42.
3. *Toonen v Australia,* UN Human Rights Committee, 31 March 1993, UN Doc CCPR/C/50/D/488/1992.
4. *Australia's Human Rights Diplomacy,* Address at Award of Human Rights Law Prize by the Minister for Foreign Affairs, Melbourne, 8 September 1994, p.9.
5. 'No One Can Own the Land', (1994) 1 *Australian Journal of Human Rights* 43 at 48.
6. Recommendation 333, Royal Commission into Aboriginal Deaths in Custody, *Overview and Recommendations,* AGPS, Canberra, 1991.


## Prison and the Home

***by Ann Aungles; Institute of Criminology, Sydney University; 1994; 302 pp; $28.00.***

The increasing privatisation of prisons in the 1990s has focused public opinion on the economic cost to the state of current penal policies. In this book, however, Ann Aungles succinctly points out other aspects of the penal equation both in the economic and emotional cost to family members (particularly mothers, partners and children) and in the unfunded utilisation by the state of these family members as part of the penal policy.

Aungles begins with a historical outline of penality and of the family. This outline is then used to illustrate the engagement between current and historical penal practices and the concept of the family. Four main modes of intersection between the home and the prison are outlined in the work: the home within the prison where both the family and the prisoner are involved in the punishment by providing, for example, their labour in a new colony; the clear separation of home and prison where the notion of home and family for a prisoner is completely absent from the discourse; the intersection between home and prison where the family and home are utilised as reforming agents within the prison through the use of visits and other mediums; and the prison in the home where the family becomes an extension of corrective services through sanctions such as probation, community service orders, after care and parole, and home detention.

The book clearly illustrates that the concept of the family has been a key component of penal policies and that the labour of carers, in particular women, has been appropriated for purposes of controlling and reforming presoners. That the concepts of the family and 'natural family duties' have been viewed as unproblematic is also revealed in the work.

*Prison and the Home* balances theoretical perspectives with the experiences of 38 carers who have family members imprisoned in New South Wales. Aungles draws on the experiences of the carers to deconstruct the penal rhetoric. She illustrates how the social construction of the home and family operates to the benefit of the NSW penal system and often the detriment of the carers, prisoners and children. At the same time the comments of the 38 carers demonstrate that the relationship between the family and the prison is a complex and difficult one that is fraught with contradictions, and that both carers and prisoners may be actively involved in resistance to the existingstructures.

The book clearly indicates that current discourse on community-based penal sanctions and the introduction of home-based detention has failed to grasp the serious implications for the family and carers of prisoners. It is an excellent resource for those who wish to expand these debates and engage in a critique of the social construction of the concepts of both the family and imprisonment.

On a methodological level Aungles provides a clear statement of the underlying objectives and approaches of her work in an appendix. She outlines the methodology and sampling procedure in a self-reflexive manner. She also grapples with some of the ethical issues involved in this project by acknowledging the dynamics involved in the interviews and the possibility for exploitation. The presentation of the methodology of the project in this way enables the reader to evaluate critically the findings in light of the underlying objectives and the self-acknowledged flaws of the project. As a research student I found the appendix a satisfying conclusion to the work and an excellent model of how these issues can be dealt with within the text.

On both a methodological and a theoretical level the *The Prison and the Home* is an excellent book for anyone interested in the discourses of penality and the family.

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